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In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT TRIBES IN OPPOSITION

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QUESTION PRESENTED

Did the Environmental Protection Agency properly promulgate and act upon federal regulations establishing Agency procedures necessary to determine on a case-by-case basis whether it should treat a Tribal government as a state for purposes identified by Congress in Section 1377 of the Clean Water Act?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

ARGUMENT 8

THE PETITION FAILS TO SATISFY ANY OF THE ELEMENTS OF RULE 10 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES 8

1. The Decision Here Does Not Conflict With Any Federal or State Court Decision (Rule 10(a)) 8

2. The EPA Decision Comports With Proper Agency Procedures And Represents A Prudent Analysis of Tribal Authority 10

3. Petitioners Misrepresent The Plain Language Of The Clean Water Act 15

4. This Case Does Not Involve A State Court Decision On An Issue Of Federal Law (Rule 10(b)) 17

5. There Is No Conflict With Relevant Decisions Of This Court (Rule 10(c)) 17

CONCLUSION 17

TABLE OF AUTHORITIES

Page

TABLE OF CASES:

Arkansas v. Oklahoma, 503 U.S. 91 (1992)..... *passim*

Baltimore Gas and Electric v. Natural Resource Defense Council, 462 U.S. 87 (1983)..... 5

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989)... 3, 10, 11, 12, 14, 15

California Coastal Construction Commission v. Granite Rock Co., 480 U.S. 572 (1987)..... 13

Chevron v. Natural Resource Defense Council, 467 U.S. 837 (1984)..... 3, 9, 10, 11, 12, 15

City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) *cert. denied*, 118 S.Ct. 410, 139 L. Ed. 2d 314, 65 U.S.L.W. 3194 (Nov. 10, 1997) 3, 4, 8, 9, 16

International Paper Co. v. Quellette, 479 U.S. 481 (1986)..... 16

Milwaukee v. Illinois, 451 U.S. 304 (1980)..... 3, 5, 10

Montana v. United States, 450 U.S. 544 (1981) 3, 10, 11, 12, 13, 15

Morton v. Ruiz, 415 U.S. 199 (1974)..... 14

Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981) *cert. denied*, 454 U.S. 1081 (1981)..... 4

Narragansett Indian Tribe v. Narragansett Electric Co., 89 F.3d 908 (1st Cir. 1996)..... 9

State of Montana v. United States Environmental Protection Agency and Confederated Salish and Kootenai Tribes, 137 F.3d 1135 (9th Cir. 1998) .. 1, 4, 9

TABLE OF AUTHORITIES – Continued

Page

Strate v. A-1 Construction, 518 U.S. 1056, 117 S.Ct. 1404 (1997) 3, 13, 14

Washington Department of Ecology v. Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985) 4

OTHER AUTHORITY:

Code of Federal Regulations

40 C.F.R. § 131.8 (1997) 1

United States Code

5 U.S.C. § 701 et seq. (1997) 2

28 U.S.C. § 1254(1) 1

33 U.S.C. § 1251 et seq. (1997) 1, 2, 6

33 U.S.C. § 1313 ..... 4, 5, 6

33 U.S.C. § 1341 6

33 U.S.C. § 1342 ..... 7, 15

33 U.S.C. § 1342(b) and (c) 7

33 U.S.C. § 1362(7) 6

33 U.S.C. § 1370 16

33 U.S.C. § 1377 ..... *passim*

33 U.S.C. § 1377(e) 2, 4, 5, 8, 14

33 U.S.C. § 1377(h)(1) 6, 14

Rules of Supreme Court

Rule 10(a) 8

Rule 10(b) 17

Rule 10(c) 17

OPINIONS BELOW

The opinion of the Court of Appeals reported at 137 F.3d 1135 (9th Cir. 1998), is reproduced in the Petition at Pet. 1a. The opinion of the District Court (Pet. 16a) is reported at 941 F.Supp. 945 (D. Mont. 1996).

JURISDICTION

Judgment of the Court of Appeals was entered on March 3, 1998. The petition for writ of certiorari was filed on May 29, 1998. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This judicial review of the exercise of Agency statutory discretion arises out of an Environmental Protection Agency rulemaking and decisional process exclusively within the parameters of the following statutes and regulations:

1. Clean Water Act of 1972, as amended, 33 U.S.C. § 1251-1387 (1997), specifically § 1377, reproduced at Pet. 130a.

2. Water Quality Standards: Requirements for Indian Tribes to Administer a Water Quality Program, 40 C.F.R. § 131.8 (1997), reproduced at Pet. 113a.

INTRODUCTION

If Congress had not enacted the Clean Water Act (33 U.S.C. § 1251 et seq., 1997), this case would not exist. In 1987 Congress amended the Clean Water Act to add § 1377, entitled "Indian tribes," which authorizes the Environmental Protection Agency ("EPA") to treat Tribal governments as the functional equivalent of states for enumerated programs. Pet. 130a. Congress vested EPA with broad statutory discretion to promulgate regulations to implement the statute. 33 U.S.C. § 1377(e). EPA properly engaged in the rulemaking process (Pet. 92a) and in accordance with those regulations determined that the Confederated Salish and Kootenai Tribes ("Tribes") should be "treated as a state" under § 1377 for the purpose of establishing surface water quality standards for waters within the Flathead Indian Reservation. Pet. 50a. EPA retained *all* permitting and enforcement authority under the Act. Pet. 50a. Petitioners brought suit seeking judicial review of these Agency actions under the Administrative Procedures Act, 5 U.S.C. § 701 et seq. (1997). In a summary judgment proceeding, the trial court found that "EPA's final decision is supported by the administrative record, consistent with EPA's regulations, and not contrary to law, and should be upheld." Pet. 48a. The appeals court affirmed. Pet. 1a.

Petitioners seek to ignore this history and their active participation in all aspects of it. They minimize the controlling role of Congressional and federal agency actions pertaining to the Clean Water Act, an act EPA is uniquely qualified to implement. Instead they seek to place before this Court a case of their own making, which, if successful, would require the Court to ignore its prior decisions

on the scope of Tribal authority in *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *Strate v. A-1 Construction*, 518 U.S. 1056, 117 S.Ct. 1404 (1997), as well as controlling decisions addressing the very EPA discretionary authority at issue in this case, notably *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), *Milwaukee v. Illinois*, 451 U.S. 304 (1980), and *Chevron v. Natural Resource Defense Council*, 467 U.S. 837 (1984).

Petitioners are asking this Court to review a judicial decision no court has made and a statute Congress did not enact. This Court has previously declined a nearly identical invitation involving the same statute, regulations, and arguments in *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 118 S.Ct. 410, 139 L. Ed. 2d 314, 65 U.S.L.W. 3194 (Nov. 10, 1997), a case notably absent from the Petition. Certiorari should be denied here also.

STATEMENT OF THE CASE

Congress enacted the Clean Water Act, as amended, "clearly to establish an all-encompassing program of water pollution regulation. Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the *administrative apparatus established by Congress* to achieve its goals." *Milwaukee*, 451 U.S. at 318 (emphasis added).

The Clean Water Act (hereafter "Act") originally only allowed delegation of federal water pollution programs to state governments that satisfied federal requirements.

In 1987 Congress amended the Act to include 33 U.S.C. § 1377, entitled "Indian tribes". Pet. 130a. "That section authorizes EPA to permit Indian tribes 'to be treated as a state' (TAS) for purposes of promulgating water quality standards" under Section 1313 of the Act. (33 U.S.C. § 1313 (1986)). *State of Montana v. United States Environmental Protection Agency and Confederated Salish and Kootenai Tribes*, 137 F.3d 1135, 1138 (9th Cir. 1998) (Pet. 4a); *Albuquerque*, 97 F.3d at 418.

Of central importance to this case, by enacting § 1377(e), Congress expressly granted the EPA Administrator extensive rule making authority for TAS purposes. In so doing, "Congress has vested in the Administrator broad discretion" to apply EPA's expertise to establish appropriate regulations to fulfill the federal policies of the Act. *Arkansas*, 503 U.S. at 105.[1] The federal policy behind § 1377 is one of recognizing, under three specific

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[1] EPA is the federal agency that is uniquely qualified to administer and implement water quality programs under the Act. *Arkansas*, 503 U.S. 91 (1992). Additionally, EPA is the Agency with the "expertise and experience in reconciling" questions of both Indian policy and environmental policy gained through administration of federal environmental statutes on Indian reservations. *Washington Department of Ecology v. Environmental Protection Agency*, 752 F.2d 1465 (9th Cir. 1985). *See also Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981). Since *Nance*, EPA has gained nearly two decades of additional expertise in the area.

criteria contained therein,[2] the right of a tribe, *inter alia*, to establish water quality standards for surface waters within Reservation boundaries. Furthermore, when as in this case, the agency decision involves scientific determinations within an area of special expertise, "a reviewing court must generally be at its most deferential." *Baltimore Gas and Electric v. Natural Resource Defense Council*, 462 U.S. 87, 103 (1983).

The provisions of § 1377 define the extent of the exercise of the "Agency's statutory discretion." *Arkansas* at 105. The provisions of § 1377 (Pet. 130a), EPA's implementing regulations (Pet. 113a), and the Agency decision to treat the Tribes as a state for the purpose of establishing water quality standards under § 1313 of the Act (Pet. 50a) are the Congressionally-established "administrative apparatus" the *Milwaukee* Court identified as defining the proper limits of this litigation.

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[2] The statutory criteria to be applied by EPA in determining whether a tribe is to be treated as a state under the Act are:

> (1) The Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are . . . within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, *in the Administrator's judgment*, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. § 1377(e) (emphasis added).

The EPA decision at issue here (Pet. 50a) recognized the Tribes as a state only for purposes of establishing surface water quality standards under 33 U.S.C. § 1313 and issuance of water quality certifications under 33 U.S.C. § 1341 for "waters of the United States"[3] that occur within the exterior boundaries of the Flathead Indian Reservation.[4] As with state water quality standards in a non-Reservation setting, the Tribal standards, promulgated in each instance with substantial guidance from the EPA, "are part of the federal law of water pollution control." *Arkansas* at 110.

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[3] The Congressional goal of the Act is to control, at the source, pollution of "navigable waters of the United States." 33 U.S.C. § 1251; 33 U.S.C. § 1362(7). The Act provides for various Federal, Tribal and State programs to address surface water pollution. The Act does not authorize any government to engage in land use regulation. Nevertheless, Petitioners persist throughout their brief in intimating that this is a case in which EPA unlawfully sanctioned an exercise of Tribal regulatory authority over land use. Neither Congress nor EPA did what Petitioners allege.

[4] Congress authorized EPA to treat Tribes as states for all surface waters within the borders of a Reservation. The geographic scope of a Reservation is defined at § 1377(h)(1) as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." Congress therefore, anticipated a unitary set of Tribal water quality standards, regardless of land ownership. Petitioners' fee/trust distinction, the gravamen of the Petition, flies in the face of plain language of the Act. Just as Congress opened the Reservation to non-Indian land acquisition (Pet. 2), here Congress authorized EPA to accept the application of Tribal water quality standards to waters traversing that same land.

Contrary to Petitioners' spectral vision of "coercive" and "unrestrained" Tribal powers arising out of the EPA decision (Pet. at 15, 18), the Tribes engage in *no* permit or enforcement proceedings for *any* activity subject to the Act. As with state water quality programs, EPA may, and in fact does here, retain all permitting and enforcement authority under the National Pollutant Discharge Elimination System ("NPDES") program (33 U.S.C. § 1342) throughout the Reservation. Federal NPDES permits are the permits at issue and Petitioners acknowledge they are obligated to obtain them under the Act. Pet. 3. The Tribes chose not to seek delegation of that TAS. Therefore, in accordance with the clear authority under the Act (33 U.S.C. § 1342(b) and (c)), EPA retained permitting an enforcement authority on the Reservation. The TAS approval document at issue expressly put the Petitioners on notice that "This approval does not provide any additional authorities (*e.g. permitting, enforcement*) beyond the water quality standards and water quality certification programs." Pet. 50a (emphasis added). *See also* Pet. 21a-22a.

The practice of EPA applying state (here Tribal) water quality standards to an EPA-issued NPDES discharge permit comports with this Court's analysis in *Arkansas*. There, a downstream state challenged upstream discharges under a 'competing sovereigns' jurisdictional analysis. This Court found it "unwise to evaluate those arguments in a case such as these [sic], which only involve a federal permit." *Arkansas* at 104. This case only involves federal permits. The Tribes issue *no* permits under the Act. There, as here, the exercise of judicial

restraint in the face of an Agency action that fulfills the policy of the Act is proper.

ARGUMENT

THE PETITION FAILS TO SATISFY ANY OF THE ELEMENTS OF RULE 10 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

1. The Decision Here Does Not Conflict With Any Federal or State Court Decision (Rule 10(a)).

As the Ninth Circuit noted, the decision in *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 118 S.Ct. 410, 139 L.Ed.2d 314, 65 U.S.L.W. 3694 (Nov. 10, 1997), the only Circuit decision to address this same set of questions, is entirely consistent with this case. Pet. 13a. Pursuant to an EPA TAS grant, the Isleta Pueblo established water quality standards that would require the off-Reservation upstream City of Albuquerque to expend significant resources to upgrade its sewage treatment facility. This was necessary to attain Tribal standards on Pueblo waters. The City sued, arguing that Tribal sovereign powers were insufficient to justify this *off-Reservation* impact on a political subdivision of the State.[5] *Albuquerque* at 421-423. The City unsuccessfully

[5] Petitioners argue (Pet. 18-19) that the instant case is the first instance of an appeals court confirmation of Tribal authority over governmental activities of a state or its political subdivisions. *Albuquerque* demonstrates otherwise, and in the arguably more attenuated off-Reservation setting. Furthermore, § 1377(e) of the Act provides a mechanism to address such a dispute, should it even occur. *See Albuquerque* at 427-428.

argued that EPA acted arbitrarily and capriciously in this regulatory framework, that EPA erred in its analysis of Tribal sovereign authority, and that the decision to grant TAS was therefore improper.

The statute and EPA regulations at issue here are the same as in *Albuquerque*. The TAS grant there, as here, rests on EPA's reliance upon those regulations. There, as here, the "substantial statutory discretion" vested by Congress in EPA to establish the regulatory framework for implementation of § 1377 was upheld by the circuit court under the Court's rationale in *Arkansas* and *Chevron*, confirming the parameters of judicial review of Agency actions. *Albuquerque* at 421-423; *Montana v. EPA*, Pet. 11a, 45a.

The Petitioners fail to even mention *Albuquerque*, the only other circuit court decision on the subject. This is particularly disturbing in light of the Ninth Circuit conclusion that the instant case "is fully consistent with the only other circuit opinion that has yet considered the issue of tribal authority to set water quality standards." Pet. 13a. Instead, Petitioners raise *Narragansett Indian Tribe v. Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996) and allude to it as a conflict between the Circuits. The *Narragansett* decision does not deal with Reservation land but rather a question of applicability of local land use regulation to a Tribal land base recently established by a special Congressional Settlement Act that authorized concurrent state and Tribal jurisdiction on certain subjects. *Narragansett* at 913, 915. The only mention of the Clean

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Petitioners did not even attempt to exhaust that Congressionally-established dispute resolution mechanism.

Water Act is a passing reference in the second to the last sentence of the published opinion. *Id.* at 922. That decision does not involve a conflict over a TAS decision made by EPA. *Narragansett* is simply inapposite. Petitioners cannot demonstrate any conflict between the circuits, for none exist.

2. The EPA Decision Comports With Proper Agency Procedures And Represents A Prudent Analysis of Tribal Authority.

The decision follows the rules on judicial review of an Agency action outlined in *Arkansas*, *Milwaukee*, and *Chevron* and therefore cannot be interpreted as having departed from the usual course of judicial review of an Agency action. Ignoring that altogether, Petitioners seek to minimize the controlling nature of that precedent with a fabricated argument that the TAS decision is predicated upon EPA's erroneous interpretation of the doctrine of inherent Tribal sovereign powers found in *Montana v. United States*, 450 U.S. 544 (1981) and the plurality opinions in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Petitioners argue that because EPA allegedly erred in its legal analysis of *Montana* and *Brendale*, the regulations upon which this TAS decision is based are unlawful.

Petitioners cannot escape the fact that the boundaries of this case are defined by the rule that:

> considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed

> by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies'

Chevron at 844 (footnote omitted) (quoting *United States v. Shimer*, 367 U.S. 374, 382-383 (1961). During its public rulemaking process EPA extensively evaluated the *Montana* standard: that even in the absence of Congressional action, "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* at 566. Pet. 96a-112a. EPA also analyzed the several plurality opinions of *Brendale*, which upheld *Montana*, *id.* It then revised the rule to require a Tribe to demonstrate not just "some" effect, as posited in *Montana*, but rather "serious and substantial impacts" (Pet. 101a) to tribal interests.[6] Rather than being arbitrary and capricious, the Ninth Circuit found this to be a "prudent"

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[6] In spite of clear language to the contrary, Petitioners argue that EPA has applied a *per se* rule ("a virtually irrebuttable presumption" Pet. 11) that if a Tribe applies for TAS on any aspect of the Act it will get it. Pet. 6. The regulations belie this. For example, as the Final Rule states:

> EPA rejects the suggestion of other commentators that EPA make a conclusive statement regarding the extent of Tribal jurisdiction over fee lands for all Tribes and all waters or even a statement regarding any particular reservation, except in the context of an actual treatment as a State application.

Pet. 99a. This imminently rational Agency decision comports with the regulatory direction of determining the applicability of § 1377 on a "case-by-case basis, based upon factual findings". Pet. 101a.

melding of the two decisions of this Court into an operating regulation. That EPA decision comports with this Court's rule that:

> The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

Chevron at 843, note 11 (citations omitted).

Petitioners interpret *Brendale* to have constricted severely the *Montana* test. They argue that after *Brendale*, the remaining attributes of inherent tribal authority over nonIndians within Reservations consists of the right to punish *tribal* offenders, determine *tribal* membership, regulate domestic relations among *tribal* members, and to prescribe rules of inheritance for *tribal* members. Pet. 15-16.

Petitioners' reading of *Montana* and *Brendale*, a version they argue EPA should have adopted by regulation, is erroneous for two reasons. First, Petitioners' interpretation of this Court's rulings would uphold an exercise of inherent Tribal authority over nonIndians only when it has no effect on nonIndians. Second, it ignores the subject matter of the cases, as well as the *Montana* standard. *Montana* addressed competing state and tribal claims to regulate Reservation hunting and fishing. *Brendale* addressed a similar conflict over land use planning.[7]

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[7] As this Court has noted, land use planning "in essence chooses *particular uses* for the land; environmental regulation, at its core, does not mandate particular uses of the land but

Neither hunting nor zoning is squarely addressed in a pervasive Congressional framework, let alone an Act of Congress with a TAS provision such as § 1377. Here, on the other hand, the Clean Water Act preempts the field of water pollution control and Congress expressly recognized a Tribal role for all surface waters within Reservation boundaries.

Petitioners also argue that *Strate v. A-1 Contractors*, 518 U.S. 1056, 117 S.Ct. 1404 (1997) further constricts the *Montana* test, a proposition the opinion itself belies. As with *Montana* and *Brendale*, the subject matter of *Strate* did not involve a pervasive federal legislative framework such as the Clean Water Act. Rather, "It 'arose between two non-Indians involved in [a] run-of-the-mill [highway] accident' " on a Reservation road, a situation this Court found " 'distinctly non-tribal in nature' ". 117 S.Ct. at 1415. The *Strate* Court relied upon the continued validity of the *Montana* test, not its demise.[8] It can hardly be

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requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulations as distinct activities." (Emphasis added). *California Coastal Construction Commission v. Granite Rock Co.*, 480 U.S. 572, 587 (1987) (upholding environmental regulation even in absence of ability to engage in general land use regulation, *id.* at 587-589).

[8] In fact *Strate* identifies *Montana* as the "pathmaking case concerning tribal civil authority over nonmembers." *Id.* at 1409. The Court found that the *Montana* opinion confirmed that "even where Congress has not expressly authorized it, tribal civil jurisdiction may encompass nonmembers." *Id.*

Strate found that *Montana* "described a general rule that absent a different Congressional direction," Tribal jurisdiction is

error for EPA to have followed the guidance that has been subsequently affirmed by this Court.

Here, EPA engaged in a regulatory process to reconcile the Congressional policy of treating Tribes as states for surface waters of the United States within the Reservation (§ 1377(h)(1)) with Petitioners' conflicting policy of opposing Tribal jurisdiction over nonIndians, and reached a prudent balance. That balance should not be disturbed. When Congress vests an agency such as the EPA with regulatory authority it "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Congress directed EPA to promulgate implementing regulations (§ 1377(e); Pet. 133a) and specifically required the Administrator to consult with tribes and states. Petitioners concede they participated, as Congress directed. Pet. 8. The voluminous Administrative Record makes that clear. The preamble to the Final Rule confirms this. Pet. 95a. The Administrative Record is replete with Petitioner's input into the regulatory process. While the Tribes perceive § 1377 to be clear and concise on its face regarding tribal jurisdiction over reservation water quality, EPA thought otherwise. Therefore, pursuant to Congressional direction, EPA promulgated the contested regulations. "Such legislative regulations are given controlling weight unless they are

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limited. *Id.* at 1409-1410. § 1377 is that "Congressional direction," envisioned by this Court. The opinion of Justice White in *Brendale*, 492 U.S. at 428, in which the Court refers to § 1377 as a delegation of federal authority to tribes, rather than to states, highlights the clarity of the statute.

arbitrary, capricious, or manifestly contrary to the statute." *Chevron* at 844 (citations omitted). Since EPA applied a prudent *Montana/Brendale* analysis, as the lower courts determined, the regulations are sound.

3. Petitioners Misrepresent The Plain Language Of The Clean Water Act.

Having failed to demonstrate the existence of conflict in judicial decisions, Petitioners attempt to create a complex federal question demonstrating a compelling reason for this Court to accept the case. They argue that no one has, or can, demonstrate that Montana's water quality laws have been preempted on non-Indian fee Reservation lands. They argue that Congress "did not preempt state law in the 1987 (§ 1377) amendments to the Act." Pet. 17.[9] Petitioners argue that a different conclusion would be

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[9] This theory ignores the plain reading of the Act – that absent express delegation to a state, EPA retains all program authority for water quality purposes. 33 U.S.C. § 1342. Petitioners cite to no delegation from EPA to Montana to operate a state water quality program on the Flathead Indian Reservation, for none exists. EPA stated that it "has never formally approved state water quality standards within the exterior boundaries of an Indian reservation because it prefers cohesive administrative management to fragmented administrative management" inherent in the checkerboard system Petitioners advocate. Brief of the Federal Appellees to the Ninth Circuit at p. 40, September 30, 1996. In fact, as the Administrative Record, AR 4, Ex. 10 (Montana Administrative Rules § 16, Water Quality Standards in force prior to this conflict) demonstrates, prior to this case Montana expressly disclaimed water quality standards authority on all Reservations in its rules.

incompatible with 33 U.S.C. § 1370, "which specifically disclaims any intent '[e]xcept as expressly provided' to 'impair [ ] or in any manner affect [ ] any right or jurisdiction of the States.' " Pet. 17. The full text of § 1370 tells a much different story.[10]

Petitioners selectively delete critical statutory language from § 1370. In relevant part, § 1370 actually reads that "[e]xcept as expressly provided *in this chapter*, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such states." (emphasis added). Petitioners simply deleted the emphasized language when presenting § 1370 to this Court. Pet. 129a. The TAS statute, § 1377 is in "this chapter" and is the "Congressional direction" identified in *Montana* and *Strate*. It expressly authorizes EPA to treat Tribes as states. No amount of selective editing by Petitioners can change that Congressional vesting of authority in EPA. The City of Albuquerque tried a similar and unsuccessful argument under § 1370. *Albuquerque* at 423. That argument failed there and should here.

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[10] This Court has previously classified § 1370 as a "savings clause" that merely protects state-law suits from preemption by the Acts' citizen-suit provisions. *International Paper Co. v. Quellette*, 479 U.S. 481, 492 (1986); *See also Arkansas v. Oklahoma*, at 99-100; *City of Albuquerque v. Browner*, 97 F.3d at 423.

4. This Case Does Not Involve A State Court Decision On An Issue Of Federal Law (Rule 10(b)).

This case does not involve any state court decision on any federal question and therefore doesn't fall within the provisions of Rule 10(b). The Petition relies exclusively on federal statute, regulation and caselaw.

5. There Is No Conflict With Relevant Decisions Of This Court (Rule 10(c)).

The lower court decisions upheld important and well-established principles of law defining the role of the courts in a judicial review of an Agency action. As discussed above, the decisions comport, rather than conflict, with the relevant decisions of this Court. Accordingly, the Petitioners also fail to satisfy the third and final element of Rule 10(c).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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